Supreme Court, U.S.
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No. 96-460

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

LIQUIDATION ESTATE OF
DE LAURENTIIS ENTERTAINMENT GROUP INC.,
Petitioner,
v.
TECHNICOLOR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Section 547(b) of the United States Bankruptcy Code, 11 U.S.C. § 547(b), authorizes a "trustee" to sue to avoid a preferential transfer. Section 1107(a) of the Code provides that a "debtor in possession" (*i.e.*, the debtor in a chapter 11 case in which no trustee has been appointed) has (with certain exceptions) all the powers of a trustee, "subject to any limitations on a trustee."

Before October 22, 1994, former 11 U.S.C. § 546(a) (applicable here) imposed a two-year statute of limitations on preference actions, running from the date of the trustee's appointment. The question presented is whether, under former § 546(a), a debtor in possession seeking to avoid a preference was subject to the same two-year limitations period imposed on a trustee, or whether there was no statute of limitations for preference actions in chapter 11 cases unless a trustee was appointed.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The following is a list of all parent companies and nonwholly-owned subsidiaries of Respondent Technicolor, Inc.:

1. Carlton Communications plc
2. Carlton Electronics Limited
3. Carlton U.S. Investments Limited
4. New CCI, Inc.

In addition, Revlon Group Incorporated, the former parent company of Respondent Technicolor, Inc., has an interest in the outcome of this matter. The following is a list of all parent companies, affiliates, and subsidiaries of Revlon Group Incorporated that have issued shares to the public:

1. The Coleman Company, Inc.
2. Consolidated Cigar Holdings Inc.
3. Laboratory Corporation of America Holdings, Inc.
4. Mafco Consolidated Group Inc.
5. Marvel Entertainment Group, Inc.
6. Meridian Sports Incorporated
7. New World Communications Group Incorporated
8. Power Control Technologies Inc.
9. Revlon, Inc.
10. Toy Biz, Inc.

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STATUTES INVOLVED

The statutes involved in this matter are: the current and former versions of 11 U.S.C § 546(a), 11 U.S.C. § 547(b), and 11 U.S.C § 1107(a).

The texts of former and current § 546(a) are reproduced on the first page of Appendix A. The texts of §§ 547(b) and 1107(a) appear on the following pages of Appendix A.

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LIQUIDATION ESTATE OF
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Technicolor, Inc. ("Technicolor") submits this opposition to the petition for writ of certiorari, filed by the Liquidation Estate of De Laurentiis Entertainment Group, Inc. ("Petitioner"), to review the decision of the United States Court of Appeals for the Ninth Circuit, reported at 87 F.3d 1061 (9th Cir. 1996). Congress in 1994 amended the statute that led to the circuits' conflict, eliminating all ambiguity on the limited issue presented here. Since the amendment, the Court has twice declined to

address the identical issue.[1] Review of the former statute at this time is not necessary to prevent future conflict, and is not otherwise warranted.

COUNTERSTATEMENT OF THE CASE

A. The Parties

Respondent Technicolor is a film laboratory, furnishing film processing and laboratory services to the motion picture industry. These services include the preparation of "release prints," from a film negative and a soundtrack, for exhibition to the public.

In 1986, Technicolor and certain affiliates entered into a "Laboratory Services Agreement" with De Laurentiis Entertainment Group, Inc. ("DEG"), under which Technicolor agreed to perform laboratory services for DEG. The agreement contained standard provisions granting Technicolor a lien on all DEG "Film Materials" in its possession, so that if DEG defaulted, Technicolor could retain the Film Materials until it was paid in full.

B. The Parafrance Transaction

In 1988, DEG agreed to sell substantially all the foreign distribution rights to its film library to Parafrance, S.A. ("Parafrance") for a purchase price of approximately $56.5 million. As a condition, Parafrance demanded that DEG obtain "Laboratory Access Letters" from Technicolor, to insure that Technicolor would provide release prints to Parafrance and would not assert its lien on the Film Materials on account of any amounts owed by DEG. Technicolor

---

[1] *Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)*, 27 F.3d 980 (4th Cir.), *cert. denied*, 115 S. Ct. 580 (1994); *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1848 (1996).

agreed to provide the requested Laboratory Access Letters upon receipt of the $3.7 million then owed to it by DEG.

The Parafrance sale closed on June 18, 1988. Parafrance paid Technicolor the amount owed to it directly, and Technicolor issued the requested letters, releasing its lien on the Film Materials with respect to any amounts then owed by DEG.

C. DEG's Chapter 11 Case and This Preference Action

DEG commenced its chapter 11 case on August 16, 1988. It operated as a debtor in possession under 11 U.S.C. § 1107(a) throughout its case; no trustee was appointed. In May, 1990, the bankruptcy court confirmed a liquidating plan, proposed by DEG with its Creditors' Committee's support. The plan created a "Liquidation Estate" and authorized the Committee to act as the Estate's representative.

The Committee commenced this action by filing a complaint in the bankruptcy court on August 30, 1991 — more than one year after DEG's plan was confirmed and more than three years after DEG's chapter 11 case commenced. The complaint alleged that the $3.7 million payment to Technicolor — in exchange for Technicolor's release of its lien on the Film Materials and its delivery of the Laboratory Letters — was voidable as a preference under 11 U.S.C. § 547(b).

In discovery, the Committee acknowledged that it had learned of the payment to Technicolor when it was formed in 1988. Neither DEG's plan or disclosure statement, however, had referred to the potential claim against Technicolor.

In its answer, Technicolor contended that the complaint was time-barred under the version of 11 U.S.C. § 546(a)(1) then in effect. Technicolor also argued that the payment it received from Parafrance was not avoidable because Technicolor's release of its lien constituted "a contemporaneous

exchange for new value" within the meaning of 11 U.S.C. § 547(c)(2), and finally that the Committee should be judicially estopped from prosecuting the claim because it was not disclosed in the plan or disclosure statement.

D. The Opinions Below

The bankruptcy court granted the Estate's summary judgment motion and denied Technicolor's summary judgment motion in December, 1992. In March, 1994, the district court reversed, holding that the complaint was timebarred. The district court relied on the Ninth Circuit's intervening decision in *Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993). There, the Ninth Circuit had held that the two-year statute of limitations on preference actions, imposed by former 11 U.S.C. § 546(a)(1), applied in chapter 11 cases and began to run when the case was commenced. The district court expressly declined to rule on the other grounds for reversal urged by Technicolor.

In June, 1996, the United States Court of Appeals for the Ninth Circuit affirmed, based on its earlier decision in *Softwaire Centre*. Because it held that the action was timebarred, it also did not consider Technicolor's other defenses.

E. Congress Amends the Statute

On October 22, 1994, President Clinton signed into law the Bankruptcy Reform Act of 1994 (the "Reform Act"),[2] one provision of which amended 11 U.S.C. § 546(a). New § 546(a) provides explicitly that in chapter 11 cases, the two-year statute of limitations on preference and other avoidance actions begins running when the case is commenced. If a trustee is appointed during the two-year period,

---

[2]Pub. L. No. 103-394, 108 Stat. 4106 (1994).

the limitations period runs to the later of the end of the two-year period or one year after the trustee's appointment.

Thus, for chapter 11 cases commenced on or after October 22, 1994, new § 546(a) resolves in the affirmative the limited issue here: whether the two-year limitations period applies to actions brought by debtors in possession.

REASONS FOR DENYING THE WRIT

I.

The 1994 Amendment to § 546(a) Resolves the Statute of Limitations Issue and Obviates the Need To Address the Conflict

Petitioner asks the Court to address a conflict based on former Bankruptcy Code § 546(a), a provision that Congress amended two years ago and that — in its prior form — affects a dwindling number of cases today. This Court has historically declined to address non-Constitutional conflicts that Congress has resolved. This is precisely such a case.[3]

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[3] As the Court noted in *Braxton v. United States*, 500 U.S. 344 (1991):

> A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . . With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. *Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute* . . . .

500 U.S. at 347-48 (emphasis added). In *Braxton*, having granted certiorari, the Court declined to address an intercircuit conflict regarding federal Sentencing Guidelines because the United States Sentencing Commission had decided to consider the issue and the case could be decided on other grounds. *Id.* at 348-49. *See also* 13 James WM. Moore et al., *Moore's Federal Practice* ¶ 810.21 at SC10-23 (2d ed. 1996) ("[T]he Court will not be inclined to grant certiorari to resolve a conflict among appellate courts . . . that is unlikely to recur. Take, for

The Estate correctly notes that the courts of appeals issued conflicting decisions over the application of former § 546(a)'s two-year statute of limitations in chapter 11 cases. Four circuits (including the court below) held that the two-year period applied to chapter 11 debtors in possession, and began to run when the chapter 11 case was commenced.[4] Two circuits disagreed, holding that unless a trustee was appointed, there was no statute of limitations for preference actions in chapter 11 cases.[5]

For cases commenced on or after October 22, 1994, however, there can be no dispute. On that date, the Reform Act became law. It amended § 546(a) to remove any possible ambiguity; as amended, the section reads:

> (a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title [*e.g.*, a preference action] may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163,

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example, a conflict that arises over a statute that has been repealed . . . .").

[4] *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990); *Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993); *Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group Inc.)*, 13 F.3d 81 (3d Cir. 1994); *United States Brass & Copper Co. v. Caplan (In re Century Brass Prods., Inc.)*, 22 F.3d 37 (2d Cir. 1994).

[5] *Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)*, 27 F.3d 980 (4th Cir.), *cert. denied*, 115 S. Ct. 580 (1994); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995).

> 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

In a voluntary bankruptcy case (whether under chapter 7, 11, 12, or 13), the "order for relief" is the filing of the bankruptcy petition.[6] In an involuntary case, the bankruptcy court enters a separate order for relief.[7] Thus, under current law the two-year period applies in chapter 11 cases, and begins to run when the petition is filed (in a voluntary case), or when the order for relief is entered (in an involuntary case). If a trustee is appointed during the two-year period, the period runs to the later of the end of the two years or one year after the trustee's appointment.

Any decision by this Court as to the application of the former statute, therefore, will not implicate present law or have any effect on future cases. The issue does not raise Constitutional concerns, and the other grounds in Supreme Court Rule 10 for granting certiorari do not apply. Accordingly, the writ should be denied.

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[6] 11 U.S.C. § 301 ("A voluntary case under a chapter of this title is commenced by the filing of a petition with the bankruptcy court under such chapter.... The commencement of a voluntary case under a chapter... constitutes an order for relief under such chapter").

[7] 11 U.S.C. § 303(h) (explaining circumstances under which bankruptcy court will "order relief" against debtor in an involuntary case).

II.

The Few Pending Cases in Which the Issue May Arise Do Not Warrant Granting the Writ

Most provisions of the Reform Act, including its amendment of § 546(a), apply only in bankruptcy cases commenced on or after the date of its enactment (October 22, 1994).[8] Accordingly, there may be pending pre-October, 1994 chapter 11 cases — like the *De Laurentiis* case here — in which preference litigation may be determined by the interpretation of former § 546(a). This possibility, however, does not warrant granting the Petition, for at least two reasons.

First, the number of cases in which the issue may arise diminishes daily. The Petition misleadingly refers to the "thousands of bankruptcy proceedings still pending in the lower courts under the pre-amended statute."[9] Most of these bankruptcy cases, however, are liquidations under chapter 7, in which this issue cannot arise. The Petition's subsequent suggestion that the issue may affect "scores of cases and tens of millions of dollars" can only be speculation.[10]

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[8]Reform Act § 702.

[9]Petition at 11.

[10]*Id.* The Petition cites New Generation, Inc., *The 1996 Bankruptcy Yearbook & Almanac* (McHugh & Weiner eds. 1996) for its reference to the "thousands" of cases still pending under the old statute. The chart on page 29 of that volume, however, does not show how many pending cases predate 1994, or how many are chapter 11 cases. The chart on page 9 of the same volume shows that over the past few years, chapter 11 cases have barely constituted 2% of all bankruptcy cases filed. There is nothing to indicate the number or dollar amount of preference proceedings in pending pre-1994 chapter 11 cases.

Copies of these pages from *The 1996 Bankruptcy Yearbook & Almanac* are attached hereto as Appendix B.

There is a more important reason why this issue should seldom arise, even in pre-1994 cases. The first reported appellate decision applying former § 546(a)'s two-year limitations period in chapter 11 cases was the 10th Circuit's *Zilkha* decision, decided in December, 1990.[11] After *Zilkha*, careful bankruptcy practitioners in other circuits — even where the issue was undecided — regularly advised their clients (debtors or creditors' committees) to commence preference actions within the two-year period.

Thus, this issue will arise only in chapter 11 cases commenced before October 22, 1994, in which viable preference claims exist and where counsel failed to advise the debtor or creditors' committee of the two-year limitation period. This Court's review of the issue is not warranted under these circumstances, especially because its decision will have no impact whatsoever on future litigation.

III.

There Is No Risk of Misinterpretation of the New Statute

Petitioner wrongly suggests that the existing split in the circuits regarding former § 546(a) may somehow be replicated in the application of the new statute:

> The existing disagreement between the circuits under pre-amended Section 546(a)(1) will necessarily spill over into the application of amended Section 546(a)(1)(B) to debtors in possession .... Plaintiffs in jurisdictions that apply the new statute to debtors in possession will be required to bring their claims, at the latest, two years after the "entry of the order for relief," 11 U.S.C. § 546(a)(1)(A), even

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[11] *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990). An earlier reported bankruptcy court decision had reached the same result. *Lill v. Bricker (In re Lill)*, 116 B.R. 543, 546 (Bankr. N.D. Ohio 1990).

> where a trustee is subsequently appointed. In contrast, plaintiffs in jurisdictions that do not apply the statute to debtors in possession will have, as provided in subsection (B), a full year after the appointment of the "first trustee" to bring their claims.[12]

This suggestion is meritless. The new statute could not be more clear: the action may be not be brought — by a debtor in possession or anyone else — more than two years after the entry of the order for relief, unless a trustee has been appointed within that two-year period, in which case the limitations period runs to the later of the end of the two years or one year after the trustee's appointment. There can be no "jurisdictions that do not apply the statute to debtors in possession," as Petitioner suggests in the quote above. By its terms, the statute (like all statutes of limitations) applies to every plaintiff. No future conflict can arise on this point.

For chapter 11 cases commenced on or after October 22, 1996, Congress has resolved in the affirmative the issue here — § 546(a)'s two-year limitations period *does* begin to run with the commencement of the case. Lower courts have acknowledged that the issue cannot reemerge under current law.[13] Accordingly, no present ambiguity on this issue warrants the Court's review of the former statute.

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[12] Petition at 12.

[13] *See Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799, 800 (7th Cir. 1995) (because of 1994 amendment, "[t]he question [the interpretation of former § 546(a)] has no prospective significance").

CONCLUSION

The amendment to 11 U.S.C. § 546(a) has resolved the question presented here for all cases commenced on or after October 22, 1994. Thus, any decision by this Court would have no prospective significance. And the number of cases involving former § 546(a)(1) is of necessity limited, both because of the passage of time and because, since 1990, bankruptcy practitioners have been on notice that a two-year limitations period might apply in chapter 11.

Under these circumstances, the Court need not expend its efforts to resolve conflicting interpretations of prior law. The writ should be denied.

Dated: October 24, 1996

Respectfully submitted,

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APPENDIX A

11 U.S.C. § 546(a)

Former Section 546(a) (before October 22, 1994)	Current Section 546(a) (on and after October 22, 1994)
§ 546. *Limitations on avoiding powers*	§ 546. *Limitations on avoiding powers*
(a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of -	(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of -
(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or	(1) the later of -
	(A) 2 years after the entry of the order for relief; or
	(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
(2) the time the case is closed or dismissed.	(2) the time the case is closed or dismissed.
. . .	. . .

11 U.S.C. § 547(b)

§ 547. Preferences

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of any interest of the debtor in property -

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider, and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . .

11 U.S.C. § 1107(a)

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2),(3), and (4) of this title, of a trustee serving in a case under this chapter.

. . .

APPENDIX B

The 1996 Bankruptcy Yearbook & Almanac

Editor: Christopher M. McHugh
Associate Editor: Courtney E. Weiner
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Bankruptcy Filings by Chapter

1980 - 1995

Year	Total	Chap.7	Chap.11	Chap.12	Chap.13
1980	331,098	249,136	6,348		75,584
1981	363,847	260,664	10,041		93,139
1982	380,212	257,644	18,821		103,738
1983	348,872	234,594	20,252		94,021
1984	348,488	234,997	20,252		93,221
1985	412,431	280,986	23,374		108,059
1986	530,008	374,452	24,740	601	130,200
1987	574,849	406,761	19,901	6,078	142,065
1988	613,606	437,882	17,690	2,034	155,969
1989	679,980	476,993	18,281	1,440	183,228
1990	782,960	543,334	20,783	1,346	217,468
1991	943,987	656,460	23,989	1,495	262,006
1992	971,517	681,663	22,634	1,608	265,577
1993	875,202	602,980	19,174	1,243	251,773
1994	832,829	567,240	14,773	900	249,877
1995	926,601	626,150	12,904	926	286,588

(Notes: Chapter 12 did not begin until 1986. "Total" includes small numbers of other Chapter and Sub-Chapter filings.)

Minor Chapters and Sections of the Bankruptcy Code

Year	Ch. 9	Sec. 304	Ch. 7 Stock Broker	Ch. 11 Railroad	Ch. 7 Commodity Broker
1982	3	1	2	1	2
1983	2	1	0	1	1
1984		(Data for 1984 not available)			
1985	3	4	1	2	2
1986		(Data for 1986 not available)			
1988	5	11	10	4	0
1989	9	28	1	0	0
1990	13	7	7	2	0
1991	18	15	3	0	0
1992	14	21	0	0	0
1993	12	19	0	0	0
1994	16	23	0	0	0
1995	10	23	0	0	0

Bankruptcies Pending

Year	Filings	Terminations	Pending	% change in Pending
1985	412,510	350,257	658,953	...
1986	530,438	413,763	775,628	17.7
1987	578,012	543,205	810,435	4.5
1988	613,465	582,206	841,694	3.9
1989	679,461	594,717	909,159	8.0
1990	782,960	658,889	1,030,443	13.3
1991	943,987	782,141	1,192,281	15.7
1992	971,517	936,330	1,216,546	2.0
1993	875,202	935,438	1,156,310	-5.0
1994	832,829	860,793	1,122,470	-2.9
1995	926,601	913,502	1,119,324	-0.3